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Order 96-11-1

Served: November 1, 1996

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 1st day of November, 1996

Joint Application of **UNITED AIR LINES, INC.** **and** **SCANDINAVIAN AIRLINES SYSTEM** **for approval of and Antitrust Immunity for an Alliance Expansion Agreement under 49 U.S.C. §§ 41308 and 41309**

Docket OST-96-1411 -15

Joint Application of **UNITED AIR LINES, INC.** **DEUTSCHE LUFTHANSA, A.G.** **and** **SCANDINAVIAN AIRLINES SYSTEM** **for approval of and Antitrust Immunity for a Coordination Agreement under 49 U.S.C. §§ 41308 and 41309**

Docket OST-96-1646 - 4

ORDER GRANTING APPROVAL AND ANTITRUST IMMUNITY FOR CERTAIN ALLIANCE AGREEMENTS

By this Order, we grant approval of and antitrust immunity for (1) an Alliance Expansion Agreement, between United Air Lines, Inc. ("United"), and Scandinavian Airlines System ("SAS"), and their respective subsidiaries; and (2) a Coordination Agreement among United, SAS, and Deutsche Lufthansa, A.G. ("Lufthansa"), collectively referred to herein as the "Alliance Agreements,"[1] pursuant to 49 U.S.C. §§ 41308 and 41309. Our action here is

[1] The term "Alliance Agreements" as used herein means (1) the Alliance Expansion Agreement made and entered into by United and SAS on June 28, 1996; (2) the Cooperation Agreement and the Code-Share Agreement both concluded between United and SAS dated as of September 1, 1995 (the "1995 Agreements"), which remain in full force and effect, and which are incorporated by reference into the Alliance Expansion Agreement (*see* Articles 2.1 and 2.4 of the Alliance Expansion Agreement); (3) any Implementing Agreements that United and SAS conclude pursuant to the Alliance

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subject to the various terms, conditions, provisions and limitations imposed by the Department of Transportation ("the Department") in Order 96-5-27, dated May 20, 1996. We direct the Joint Applicants to resubmit for renewal their alliance agreement(s) before May 20, 2001. If the Joint Applicants choose to operate under a common name or brand, they must obtain advance approval from the Department before implementing the arrangement.

As an express condition to the grant of antitrust immunity to the Alliance, we also direct United, SAS, and Lufthansa to withdraw from any participation in any International Air Transport Association ("IATA") tariff coordination activities that discuss any proposed through fares, rates, or charges applicable between the United States and Denmark, Norway, and Sweden; the United States and Austria, Belgium, Germany, the Netherlands, or Switzerland; and/or the United States and any other countries designating a carrier granted antitrust immunity, or renewal thereof, for participation in similar alliance activities with a U.S. carrier. We further direct SAS to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic data ("O&D Survey") for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by United).[2]

I. BACKGROUND

A. United and Lufthansa's Existing Alliance Expansion Agreement

By Order 96-5-27, issued May 20, 1996, we granted final approval and antitrust immunity for an Alliance Expansion Agreement,[3] between United and Lufthansa, and their subsidiaries, pursuant to 49 U.S.C. §§ 41308 and 41309. The action by the Department was subject to the provision that the antitrust immunity did not cover any activities of United and Lufthansa as owners of Apollo/Galileo and Amadeus/START, respectively, and subject to the limitations and conditions defined in Appendices A and B to the Order. We directed United and Lufthansa to resubmit their Alliance Expansion Agreement five years from the date of issuance of the final order in the case (*i.e.*, May 20, 2001). We also decided that if United and

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Expansion Agreement (*see* Articles 2.4 and 5.2 of the Alliance Expansion Agreement); (4) the Coordination Agreement dated as of August 9, 1996, among United, SAS, and Lufthansa; and (5) any subsequent agreement(s) or transaction(s) by the Joint Applicants pursuant to the foregoing agreements.

2 Lufthansa is already subject to this O&D Survey reporting requirement (*see* Order 96-5-27, ordering paragraph 4).

3 Regarding the United and Lufthansa alliance, the term "Alliance Expansion Agreement" as used herein means the following agreements between the Joint Applicants: (1) the agreement entered into on January 9, 1996; which incorporates their agreement dated October 3, 1993, which remains in full force and effect; (2) any implementing agreements that the Joint Applicants conclude pursuant to the January 9, 1996, agreement to develop and carry out the United and Lufthansa alliance; and (3) any subsequent agreement(s) or transaction(s) by the Joint Applicants pursuant to the foregoing agreements.

Lufthansa chose to operate under a common name or use "common brands" they would have to obtain separate approval from the Department before implementing the arrangement.

Moreover, we directed the airlines to withdraw from participation in any International Air Transport Association (IATA) tariff coordination activities that discussed any proposed through fares, rates or charges applicable between the United States and Germany, the United States and the Netherlands, and/or the United States and any other countries whose designated carriers participate in similar agreements with U.S. airlines that are subsequently granted antitrust immunity or renewal thereof by the Department. Finally, we directed Lufthansa to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic data for all passenger itineraries that included a United States point (similar to the O&D Survey data already reported by United).

B. The Open-Skies Accords with Denmark, Norway and Sweden

On June 16, 1995, the Governments of the United States and Denmark, Norway, and Sweden (collectively referred to as Scandinavia) reached agreement on a new Open Skies aviation relationship among the four countries. The predicate for our approval and grant of antitrust immunity for the United-SAS alliance is the existence of the expansive, new aviation agreements between the United States and Denmark, Norway, and Sweden. These new accords allow any U.S. airline to serve any point or points in Scandinavia from any point in the United States (with open behind, intermediate and beyond rights) and provide reciprocal rights to any Scandinavian airline. As the earlier U.S.-Netherlands Agreement has demonstrated, Open Skies aviation will encourage more competitive service in the U.S.-Scandinavia marketplace. Since the price and quality of U.S.-Scandinavia airline service will be disciplined by market forces, U.S. travelers will have an incentive to travel through Scandinavia to beyond points, in competition with services offered through other European gateways.

C. The United, SAS, and Lufthansa Operational Relationships[4]

United and SAS operate transatlantic, code-share services in the following five U.S.-Scandinavia markets:[5]

Newark-Copenhagen: Operated daily by SAS (nonstop service).

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4 SAS offers no nonstop flights between the United States and Germany. Lufthansa offers no nonstop flights between the United States and Scandinavia. Moreover, no nonstop fifth-freedom routes to or from the United States are served by both Lufthansa and SAS. United and Lufthansa both provide nonstop service in the Chicago-Frankfurt and Washington, D.C.-Frankfurt markets. Joint Application and Motion to Consolidate, at 10.

5 United does not provide any service between the United States and Scandinavia with its own aircraft.

Newark-Oslo: Operated daily by SAS (nonstop service).

Newark-Stockholm: Operated daily by SAS (nonstop service).

Chicago-Copenhagen: Operated daily by SAS (nonstop service).

Seattle-Copenhagen: Operated daily by SAS (nonstop service).

United and SAS also operate transatlantic, code-share services in the following four city-pair markets:[6]

Los Angeles-London: Operated daily by United (nonstop and one-stop service).

New York-London: Operated daily by United (nonstop service).

San Francisco-London: Operated daily by United (nonstop and one-stop service).

Washington, D.C.-Amsterdam: Operated daily by United (nonstop service).

The United and SAS code-share arrangement provides for the joint coordination of schedules, passenger reservation systems, frequent flyer programs, advertising and promotion, airport and terminal facilities, station and ground handling services, and cargo services. The current arrangement provides that each carrier markets and sells its portion of seats under its airline designator code. However, each carrier maintains control over the management of inventories on the flights that it operates. In this respect, it is not a blocked-space agreement.[7] The agreement further provides that each carrier is an independent contractor and independently establishes fares and rates on the seats sold under its code.[8]

Furthermore, SAS and Lufthansa have established an alliance arrangement integrating their air transport systems, including a contractual joint venture on Germany-Scandinavia routes. The European Commission approved the SAS-Lufthansa alliance venture in January 1996.[9]

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6 United also places its code on flights operated by SAS beyond United's London and Amsterdam gateways to Copenhagen, Oslo, and Stockholm, as well as beyond Copenhagen to Helsinki (Joint Application dated May 28, 1996, Exhibit JA-3). Moreover, SAS places its code on flights United operates behind Chicago to Dallas/Ft. Worth, Houston, Minneapolis, and Seattle; and behind Newark to Chicago, Denver, Los Angeles, and San Francisco (Joint Application, Exhibit JA-4).

7 Code-Share Agreement, dated as of September 1, 1995, § 4.5.

8 Code-Share Agreement, dated as of September 1, 1995, §§ 4.9 and 13.

9 Joint Application, at fn 2.

II. THE UNITED, SAS, and LUFTHANSA JOINT VENTURE

The Joint Applicants' proposed arrangement consists of two discrete but parallel agreements: (1) an Alliance Expansion Agreement, between United and SAS, and their respective subsidiaries, and (2) a Coordination Agreement that would link the proposed United/SAS Alliance with the United/Lufthansa and Lufthansa/SAS Alliances. Together, these two agreements would create a long-term system for coordination between and among the Joint Applicants to establish and implement any or all of these Alliances.

The essential elements of the Alliance Agreements include coordinated flight schedules, route networks, and route planning; the establishment of joint marketing, advertising and distribution networks; "co-branding" and joint product development; code-sharing; the harmonization of existing internal information systems, including inventory, yield management, reservations, ticketing, accounting, maintenance, financial reporting, and distribution; revenue pooling and sharing; standardization of contracts with suppliers, travel agents, general sales agents, and other organizations and individuals; uniform product and service standards; coordinated cargo programs; the parties will continue to coordinate their frequent flyer programs; and coordinated pricing and inventory control. In summary, the Alliance Agreements, if approved, will allow the three airlines effectively to operate much as a single company, while retaining their individual identities regarding ownership and control.

III. THE APPLICATION and RESPONSIVE PLEADINGS

A. The Joint Applicants' Requests

On May 28, 1996, United and SAS filed a request seeking approval of and antitrust immunity for their Alliance Expansion Agreement, for a five-year term. Through this Agreement, the carriers state that they intend to broaden and deepen their cooperation, thus improving the efficiency of their existing cooperative marketing relationships. They state that this improved cooperation will also expand the benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. While stating that they will continue to be independent companies, they affirm that the objective of the Alliance Expansion Agreement is to enable the companies to plan and coordinate service over their respective route networks as if there had been an operational merger between the companies, thus facilitating a "seamless transportation service" to the public.

They maintain that approval of, and antitrust immunity for, the Alliance Expansion Agreement is supported by the many commercial benefits and efficiencies that will result from implementation of the Agreement and by U.S. international aviation policy. They state that the alliance will create network synergies by (1) linking the U.S.-European hubs of the alliance partners, (2) producing cost efficiencies and savings through integration and coordination that can be passed on to consumers in the form of lower fares and improved service, and (3) increasing transatlantic competition. Conversely, they argue that denial of their requests will prevent consummation of the Alliance Agreements and thereby deny these benefits to the

public. The applicants state that implementation of the Alliance Agreements without immunity would expose United and SAS to "unacceptable risks of costly and distracting private antitrust suits by competitors and other private parties."[10] Therefore, the airlines regard antitrust immunity as an essential condition precedent to implementation of the expansion of their coordinated activities under the Alliance Agreements.

The applicants maintain that the carriers cannot attain these public interest benefits individually, due to existing bilateral barriers and financial considerations; or through merger, because U.S. and European Union ("E.U.") laws concerning nationality and ownership effectively preclude mergers between U.S. and E.U. airlines.[11] Therefore, they state that in the absence of a merger, the joint venture planned by the Alliance Expansion Agreement requires that the applicants craft business understandings that will expose them to the risk that these coordinated activities would be challenged on antitrust grounds. The Joint Applicants state that the Alliance Agreements will permit them to compete more effectively against competing global alliances. They further maintain that the Alliance Agreements will allow them to develop mechanisms to enhance efficiencies, reduce costs and provide better service to the traveling and shipping public by providing for: increased frequencies and enhanced on-line services; expanded access to the alliance partners' beyond/behind-gateway markets; coordinated hubs and transatlantic segments; expansion of discount fares; availability of discount seats on transatlantic segments; inventory control; reduced sales, marketing and reservations costs; and more effective equipment utilization.

The Joint Applicants also maintain that the grant of antitrust immunity will advance U.S. international aviation policy objectives by accelerating liberalization of the U.S.-Europe marketplace, thus achieving an important goal of the Department's "Open Skies" initiative.[12]

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10 Joint Application, at 6. We also note that both the Alliance Expansion Agreement and the Coordination Agreement provide that the parties will not proceed with the expansion of their alliance absent the grant of immunity from U.S. antitrust laws (*see* Supplement 1 to Joint Application, Exhibit JA-9, at 2; and also Joint Application and Motion to Consolidate, Exhibit JA-1, at 2).

11 The Joint Applicants maintain that if U.S. and E.U. aviation law permitted the airlines to merge, their merger would comply with U.S. antitrust law. Since, the applicants assert, the proposed business relationship would essentially be an "end-to-end market extension merger," it would have only a nominal impact on horizontal competition. Joint Application, at 5-6.

12 The Joint Applicants note that the United States has already entered into Open-Skies Agreements with the Governments of Denmark, Norway, and Sweden. Coupled with similar Agreements signed with other European countries, most recently with Germany, "the Department now has in place a critical mass of liberal agreements that provide U.S. carriers open access to nearly 40% of the U.S.-Europe market." Joint Application, at 6-7. They maintain that approval of the Alliance Agreements coupled with antitrust immunity will encourage foreign governments with restrictive aviation regimes to open their markets to U.S. airlines. They argue that an immunized United/Lufthansa and SAS alliance will promote further liberalization within the transatlantic marketplace.

Further, the applicants assert that the Alliance Agreements are fully consistent with the Department's policy of encouraging and facilitating the globalization and cross-networking of air transportation. They maintain that approval of the proposed Alliance Agreements coupled with antitrust immunity will foster real economic and competitive pressures in the marketplace that will accelerate reform and transform aviation policy.

The applicants hold the view that their request is warranted by foreign policy considerations, fully consistent with U.S. international aviation policy, and is an envisioned outcome of the newly liberalized Open-Skies aviation arrangement between Denmark, Norway, and Sweden and the United States. United and SAS contend that denial of the request for antitrust immunity might well discourage other foreign governments from negotiating Open Skies accords with the United States. The applicants assert that their request for antitrust immunity is fully consistent with the U.S. Government's commitment to open-entry markets and free and fair international competition and to what they contend is the Department's assurance of comparable opportunities in exchange for open skies.

The applicants assert that the Alliance Agreements will not substantially reduce or eliminate competition between the United States and Europe. Indeed, they argue that fully implemented Alliance Agreements will enable the applicants to increase their competitiveness, placing additional commercial pressure on rival European carriers and carrier alliances. They also maintain that almost all significant transatlantic city-pair routes are or can be served by multiple U.S. and/or European airlines on either a nonstop, single-plane, or one-stop on-line connecting basis.[13]

Regarding the U.S.-Scandinavia market, the applicants state that two competing U.S. airlines are operating nonstop service between the United States and Scandinavia (United does not provide, apart from its code-share operations with SAS, scheduled passenger service in the U.S.-Scandinavia market).[14] Additionally, the applicants note that various third-country

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13 The applicants assert that their combined market shares are not sufficient to enable the alliance to dominate the U.S.-Europe market, or to permit them to introduce supra-competitive pricing or to reduce service below competitive levels. They state that the United/Lufthansa alliance and SAS both have modest shares of currently available transatlantic capacity. The applicants' exhibits indicate that United/Lufthansa's share of the market for both departures and seat capacity is about 13 percent, and that SAS's share of the market for both departures and seat capacity is about 2 percent. The exhibits also show that the Delta/Austrian/Sabena/Swissair alliance market share for departures and seats is greater than the applicant airlines (about 16.5%, as compared to about 15% for the applicant airlines); and that British Airways' market share for seat capacity is about the same as the applicant airlines (about 15% for each). Joint Application, Exhibit JA-6.

14 During 1996, American Airlines and Delta Air Lines provided nonstop scheduled service in the Chicago-Stockholm and New York-Copenhagen markets, respectively. Additionally, American offers direct service between Dallas/Ft. Worth, Los Angeles, Miami, and Stockholm; while Delta offers direct service between Atlanta, Cincinnati, Dallas/Ft. Worth, Los Angeles, Orlando, San Francisco, Salt Lake City and Copenhagen. *Official Airline Guides Worldwide Edition*, October 1996.

airlines provide air service between the United States and Scandinavia.[15] For these reasons, the applicants state that air service competition in the U.S.-Scandinavia market is "comparable to that between the U.S. and the Netherlands, Switzerland, Belgium, and Austria at the time the Department granted antitrust immunity to KLM and Northwest and to Delta/Swissair/ Sabena/Austrian."[16]

The applicants also assert that the alliance will not substantially reduce or eliminate competition on any single route. They note that the alliance partners do not compete in any U.S.-Scandinavia city-pair market.[17] They state that United's only service in the U.S.-Scandinavia market is offered under vertical code-share arrangements, under which United offers SAS's seats for sale under its own code. They further assert that United neither has blocked-space arrangements with SAS, nor operates its own equipment on any U.S.-Scandinavia city-pair route. Further, the applicants note that the Open-Skies Agreements between the U.S. and the Scandinavian countries will assure competitive discipline by providing for open entry and pricing and service freedom.

Finally, the applicants state that, consistent with the Department's earlier antitrust immunity decisions, they are prepared voluntarily to withdraw from participation in any IATA traffic coordination activities that discuss any proposed through fares, rates or charges applicable between the United States and Denmark, Norway, and Sweden, and between the United States and any other countries designating an airline granted antitrust immunity for participation in similar alliance activities with a U.S. airline.[18] They also affirm that SAS is prepared to report full itinerary O&D Survey data for all passenger itineraries that include a United States point (similar to the O&D Survey data now reported by United to the Department).

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15 During 1996, Aeroflot, Air France, British Airways, Czech Airlines, Icelandair, KLM, Sabena, and Swissair provided scheduled combination service in the U.S.-Scandinavia market. Joint Application, Exhibit JA-7.

16 Joint Application, at 35.

17 In the U.S.-Germany marketplace, United and Lufthansa both operated competing nonstop service in the Chicago-Frankfurt and Washington, D.C.-Frankfurt markets. Regarding these two city pairs, United and Lufthansa undertook to exclude from the scope of their earlier requested immunity capacity, fares, and yield management decisions for particular U.S.-source local passengers in these markets. We accepted their suggestion and did not grant immunity for those decisions. Order 96-5-27, Appendix A.

18 Joint Application, at 41-42.

B. Responsive Pleadings

On August 8, 1996, American Airlines, Inc. ("American"), and the International Air Transport Association ("IATA") filed comments to the United/SAS application.[19]

1. American

As an initial matter, American states that it does not oppose the Joint Applicants' request. American instead specifies for the Department its view that United has a "blatant double standard," which American maintains would have the Department apply one set of rules to United and its allies, and another set of rules to its competitors. American alleges that United has achieved antitrust immunity for its own various worldwide alliances, while at the same time "doggedly" opposing (1) the American and Canadian Airlines International Ltd. antitrust immunity application for a multiplicity of reasons (Docket OST-95-792), (2) the proposed American and TACA Group reciprocal code-share services proceeding (Docket OST-96-1700), (3) various other code-sharing arrangements that American has entered into or has proposed to enter into with foreign airlines (such as, South African Airways, LOT-Polish Airlines, El Al Israel Airlines, and Transaero Airlines), and (4) American's proposed alliance with British Airways.

2. IATA

IATA reiterates its earlier requests that the Department withdraw from consideration in this case the issue of whether approval of the application should affect the joint applicants' continued participation in IATA tariff coordination.[20] IATA argues that any action in this case to deny a carrier's interline access through the Tariff Conference mechanism would be

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19 By Order 96-7-25, issued July 18, 1996, we found that the application was substantially complete, and established a procedural schedule. We also deferred action on the motions for confidential treatment of certain data and documents filed by United and SAS on July 1, 1996 (the carriers also filed a copy of their Alliance Expansion Agreement, as a supplement to their application), while limiting access to the information to counsel and outside experts who represent interested parties in this case.

On August 14, 1996, in Docket OST-96-1646, United, SAS, and Lufthansa filed an application for approval and antitrust immunity for a "Coordination Agreement" among the three airlines, and a motion to consolidate for decision (1) the August 14, 1996, application together with (2) the May 28, 1996, application filed by United and SAS, in Docket OST-96-1411. The two requests were unopposed. By Notice dated August 28, 1996, the Department granted the motion and established a procedural schedule for the submission of answers and replies. No answers were filed. The two applications are now ripe for decision.

20 *See* Dockets OST-95-618, May 28 and 31, 1996 (the Delta/Austrian/Sabena/Swissair alliance proceeding); OST-95-792, February 6, 1996 (the American Airlines and Canadian Airlines International alliance proceeding); OST-96-1116, May 16, 1996 (the United and Lufthansa alliance proceeding); and OST-96-1434, August 2, 1996 (the United and Air Canada alliance proceeding).

unfair to IATA, its members, and their respective governments. IATA further maintains that it is legally "inappropriate and unfair" to the participants in Docket 46928 (a proceeding addressing the issues relating to the approval and immunity of IATA tariff coordination) for the Department to consider alliance-based constraints on carrier participation in tariff coordination in this and other alliance application proceedings. IATA therefore requests that the Department refrain from considering in this docket the question whether approval of the application should affect the rights of SAS to participate in IATA tariff coordination.

3. The Joint Applicants

On August 19 and September 13, 1996, the Joint Applicants filed replies, urging the Department to act expeditiously on these matters. They note that neither American nor IATA filed comments opposing their applications. They further maintain that the comments filed by these parties either, in the case of American, fail to address the merits of the applications, or, in the case of IATA, solely address the conditions that the Department may impose on a grant of immunity from U.S. antitrust laws.

IV. DECISION SUMMARY

United, SAS, and Lufthansa, and their respective subsidiaries, have applied for approval of and antitrust immunity for certain Alliance Agreements under 49 U.S.C. §§ 41308 and 41309, whereby they will plan and coordinate service over their respective route networks as if there had been an operational merger between the companies. We find that the Alliance Agreements should be approved and granted antitrust immunity, to the extent provided below. Our examination of the applicants' proposal leads us to find that the integration of SAS's operations with the existing United and Lufthansa alliance will enhance competition overall and allow the airlines to provide better service and enable them to operate more efficiently. We also find that it is unlikely that the Alliance Agreements -- subject to the conditions included here -- will substantially reduce competition in any relevant market. Finally, our approval and grant of antitrust immunity for the proposed Alliance Agreements will allow the Joint Applicants to maximize fully the various pro-competitive and pro-consumer benefits associated with integrated alliances that we foresaw resulting from the fundamental liberalization of air services fostered by an open aviation accord.

In addition, we will require the applicants to (1) withdraw from all IATA tariff conference activities affecting through prices between the United States and Denmark, Norway, and Sweden and for other markets described below; (2) file all subsidiary and or subsequent agreement(s) with the Department for prior approval, as described below; and (3) resubmit for renewal their variously styled alliance agreement(s) before May 20, 2001. We also find it in the public interest to direct SAS to report full-itinerary O&D Survey data for all passengers to and from the United States (similar to the O&D Survey data reported by United). Finally, our actions here are also subject to the various provisions and limitations provided for in Order 96-5-27.

We find that our action in this matter will advance important public benefits, and is consistent with our policy of facilitating competition among emerging multinational airline networks. We fully recognize the trend toward expanding international airline networks as a response to the underlying network economics of the airline industry.

Finally, we have determined it appropriate and consistent with the public interest to issue a final decision in this case. Interested parties have had full opportunity to comment on these matters. The applications are unopposed. We also have determined that the proposed alliance presents no significant competitive issues requiring further consideration. We therefore will dispense with the issuance of an Order to Show Cause and issue a final order approving these unopposed applications.

V. DECISIONAL STANDARDS UNDER 49 U.S.C. §§ 41308 and 41309

A. Section 41308

Under 49 U.S.C. section 41308, the Department has the discretion to exempt a person affected by an agreement under section 41309 from the operations of the antitrust laws "to the extent necessary to allow the person to proceed with the transaction," provided that the Department determines that the exemption is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. We are willing to make exceptions, however, and thus grant immunity, if the parties to such an agreement would not otherwise go forward without it, and we find that grant of antitrust immunity is required by the public interest.

B. Section 41309

Under 49 U.S.C. section 41309, the Department must determine, among other things, that an inter-carrier agreement is not adverse to the public interest and not in violation of the statute before granting approval.[21] The Department may not approve an inter-carrier agreement that substantially reduces or eliminates competition unless the agreement is necessary to meet a serious transportation need or to achieve important public benefits that cannot be met or that cannot be achieved by reasonably available alternatives that are materially less anticompetitive.[22] The public benefits include international comity and foreign policy considerations.[23]

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21 Section 41309(b).

22 Section 41309(b)(1)(A) and (B).

23 Section 41309(b)(1)(A).

The party opposing the agreement or request has the burden of proving that it substantially reduces or eliminates competition and that less anticompetitive alternatives are available.[24] On the other hand, the party defending the agreement or request has the burden of proving the transportation need or public benefits.[25]

VI. APPROVAL OF THE AGREEMENT

A. Antitrust Issues

The Joint Applicants state that through the Alliance Agreements they intend to broaden and deepen their cooperation in order to improve efficiency, expand various benefits available to the traveling and shipping public, and enhance their ability to compete in the global marketplace. They state that, while retaining their separate corporate and national identities, they fully intend to cooperate to the extent necessary to create a seamless air transport system. Accordingly, the Alliance Agreements' intended commercial and business effects are equivalent to those resulting from a merger of the three airlines. In determining whether the proposed transaction would violate the antitrust laws, we apply the Clayton Act test used in examining whether mergers will substantially reduce competition in any relevant market.[26]

The Clayton Act test requires the Department to consider whether the Alliance Agreements will substantially reduce competition by eliminating actual or potential competition between United, SAS, and Lufthansa so that they would be able to effect supra-competitive pricing or reduce service below competitive levels.[27] To determine whether a merger or comparable transaction is likely to violate the Clayton Act, the Department of Justice and the Federal Trade Commission use their published merger guidelines.[28] The Merger Guidelines' general approach is that transactions should be blocked if they are likely to create or enhance market power, market power being defined as the ability profitably to maintain prices above competitive levels for a significant period of time (firms with market power can also harm customers by reducing product and service quality below competitive levels). To determine whether a proposed merger is likely to create or enhance market power, we primarily consider whether the merger would significantly increase concentration in the relevant markets, whether

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24 Section 41309(c)(2).

25 *Id.*

26 We have determined it appropriate to use the standard Clayton Act test in each of our earlier alliance/antitrust immunity cases. *See* Orders 96-5-38, at 16 (American/Canadian Airlines International); 96-5-26, at 18 (Delta/Austrian/Sabena/Swissair); 96-5-12, at 17 (United/Lufthansa); and 92-11-27, at 13 (Northwest/KLM).

27 *Id.*

28 57 Fed. Reg. 41552 (September 10, 1992).

the merger raises concern about potential competitive effects in light of concentration in the market and other factors, and whether entry into the market would be timely, likely, and sufficient either to deter or to counteract a proposed merger's potential for harm.

There are four relevant markets requiring a competitive analysis: first, the U.S.-Europe market; second, the U.S.-Denmark, Norway, Sweden (Scandinavia) markets; third, the city-pair markets; and, fourth, the behind- and beyond-gateway markets.

Our analysis shows that the proposed United and SAS alliance will only nominally increase concentration in the transatlantic market,[29] the U.S.-Scandinavia market,[30] and the U.S.-Denmark, Norway, and Sweden markets.[31] Likewise, these determinations also apply to the combination of the proposed United/SAS alliance with the existing United/Lufthansa alliance.[32]

1. The U.S.-Europe Market

We find that the Alliance Agreements should not substantially diminish competition in the U.S.-Europe marketplace. During the twelve months ended March 1996, our analysis shows that the U.S.-Europe nonstop passenger market shares for United, Lufthansa, and SAS were 7.8 percent, 6 percent, and 1.7 percent, respectively (the airlines' combined share of the market was 15.5 percent). In contrast, the British Airways and USAir code-share alliance had a 15.5 percent nonstop passenger market share; the Delta, Austrian, Sabena, and Swissair

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29 SAS's total transatlantic passenger market share was 1.7 percent, and United's was about 8 percent. Source: T-100 and T-100f nonstop segment and market data, 12 months ended March 1996.

30 United reported an O&D market share of only 3.5 percent. Source: O&D Survey data, 12 months ended September 1995.

31 United reported an O&D market share of 3.6 percent, in the U.S.-Denmark market; 3.9 percent, in the U.S.-Norway market; and 3.2 percent, in the U.S.-Sweden market (as indicated earlier, United's market share results from passengers sold tickets under United's code who fly on SAS flights). Source: O&D Survey data, 12 months ended September 1995.

32 The only common U.S. gateways served by SAS, on the one hand, and United and Lufthansa, on the other hand, are Chicago (O'Hare Airport) and Newark. The alliance between United and Lufthansa, joined by SAS, should not significantly affect competition at these gateways. While Chicago is a United hub, it is also a hub for American, whose 43 percent share of the Chicago transatlantic market is larger than United's 24 percent share. British Airways also operates a substantial amount of transatlantic service at O'Hare. Newark, on the other hand, is not a hub for United but is a hub for Continental Airlines, which serves a number of European destinations from that airport. Several European carriers operate transatlantic service at Newark, and both U.S. and European carriers operate numerous transatlantic flights from the New York City area's other longhaul airport, JFK. SAS' alliance with United and Lufthansa will not create new barriers at O'Hare and Newark to entry into the markets affected by the alliance.

alliance had a 14.7 percent nonstop passenger market share; and the Northwest Airlines and KLM Royal Dutch Airlines alliance had a 8.7 percent scheduled passenger market share.[33] These figures show that the U.S.-Europe marketplace is competitive, both as to nonstop and connecting service options.

Our analysis of the U.S.-Europe marketplace also indicates that the transatlantic Herfindahl-Hirschman Indices (HHIs), as adjusted for the previously approved alliances, was about 1088.[34] Under the Department of Justice's (DOJ) merger guidelines, the overall transatlantic market was therefore moderately concentrated.[35] We determined that the proposed blending of SAS with the existing United/Lufthansa alliance would increase the transatlantic HHIs to about 1,134, an increase in concentration of about 4 percent.[36]

For these reasons, we find that (1) the increase in transatlantic concentration resulting from the blending of SAS's operations with those of the United and Lufthansa alliance will not be substantial; (2) the SAS component of the HHI increase would satisfy DOJ's threshold test; and (3) nonstop and single-plane competition would not be reduced in any city-pair market, we find that the tripartite alliance will not substantially reduce competition.

2. The U.S.-Denmark, Norway, and Sweden (Scandinavian) Markets[37]

United and SAS do not currently compete to any significant extent in any transatlantic markets. United itself does not operate any flights to Scandinavia. Moreover, SAS offers no nonstop flights in the U.S.-Germany market, and Lufthansa offers no nonstop flights in the U.S.-Scandinavia market. Further, there are no nonstop fifth-freedom routes to or from the U.S. served by both Lufthansa and SAS.[38] The current code-share arrangement between United and SAS involves five gateway-to-gateway nonstop U.S.-Scandinavia routes. In addition, United places its code on flights operated by SAS beyond United's London and Amsterdam gateways to Copenhagen, Denmark; Oslo, Norway; and Stockholm, Sweden, as

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33 Additionally, the U.S.-Europe nonstop passenger market share for American Airlines was about 11 percent; TWA about 5 percent; and Virgin Atlantic Airways Ltd. about 5 percent. Source: T-100 and T-100(f) nonstop segment and market data.

34 Source: T-100 and T-100f nonstop segment and market data, 12 months ended March 1996.

35 The DOJ considers markets with a HHI between 1,000 and 1,800 to be moderately concentrated.

36 The DOJ does not usually challenge post-merger concentrations under 1,800, if the increase in HHI caused by the merger does not exceed 100 points.

37 We have previously determined that the U.S.-Germany marketplace is competitive, both as to nonstop and connecting service options. Order 96-5-12, at 21-24.

38 Joint Application and Motion to Consolidate, at 10.

well as beyond Copenhagen to Helsinki, Finland. Although United and SAS coordinate on a service and marketing basis, the airlines price their seats independently in competition with each other.

Although United and SAS each independently sets the fares for the seats sold under its code under the current code-share arrangement, we do not view the two airlines as significant competitors in U.S.-Scandinavia markets. Their agreement specifically states that it is not a blocked-space agreement and that the airline operating the flight has ultimate control over the inventory on the flight. In these circumstances, the airline partner that does not operate the flight should have little ability or incentive to engage in price competition with the airline that operates the flight. Thus, the new arrangements between SAS and United will not result in any significant loss of competition in any U.S.-Scandinavia market.

In these country-pair markets, served through the Copenhagen, Oslo, and Stockholm gateways,[39] SAS and its partners will have the largest market share. Nonetheless, based on our evaluation, we do not find that the proposed integration will enable the Joint Applicants to charge supra-competitive prices or to reduce service below competitive levels.[40]

The proposed arrangement between United and SAS is like an end-to-end combination. Our analysis indicates that the alliance will have a minimal competitive impact. United and SAS serve no common nonstop or single-plane markets, no common European gateways, and only two common U.S. gateways, only one of which (Chicago O'Hare Airport) is a hub for United.

We therefore find that the alliance between United and SAS will not eliminate or substantially reduce competition in any market. Moreover, competitors will have free and open access to the marketplace due to the U.S.-Denmark, Norway, and Sweden Open-Skies accords. Despite the large market shares held by SAS in the Scandinavia markets, we see no barriers to entry by other U.S. airlines in the Denmark, Norway, and Sweden markets. In fact, other U.S. airlines already provide nonstop service between the United States and Scandinavia. Delta Air Lines operates nonstop flights between New York's JFK Airport and Copenhagen, and American Airlines operates nonstop flights between Chicago's O'Hare Airport and Stockholm.

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39 Neither United nor Lufthansa operate their own flights in any U.S.-Copenhagen, Oslo, and Stockholm markets.

40 In the U.S.-Scandinavia market, SAS carried 74 percent of the total passengers transported, American carried 15 percent, and Delta carried 11 percent. Source: T-100 and T-100(f) nonstop segment and market data, 12 months ended March 1996.

3. The City-Pair Markets[41]

A third category of relevant market consists of the city-pair markets that would be affected by the alliance between United and SAS. The record shows that United and SAS do not compete on a nonstop basis in any city-pair market.[42] Indeed, United neither has a blocked-space arrangement with SAS, nor operates its own equipment on any U.S.-Scandinavia city-pair route. The alliance therefore will not eliminate or substantially reduce competition in any city-pair market. Similarly, although United and Lufthansa operate competitive service in two nonstop transatlantic markets (Chicago-Frankfurt and Washington, D.C.-Frankfurt),[43] SAS does not operate competitive nonstop or single-plane service in any United and Lufthansa alliance market.

4. The Behind- and Beyond-Gateway Markets[44]

As we have noted, the pro-competitive effects of global alliances can be particularly evident in the case of the behind- and beyond-gateway markets, where many passengers now lack convenient on-line service, and where integrated alliances with coordinated connections, marketing, and services can, therefore, offer competition well beyond traditional interlining. For example, our analysis estimates that the proposed United and SAS alliance will result in enhanced on-line connecting opportunities to about 130 cities in Europe and beyond from 247 cities in the United States. These markets raise no competitive concerns because there are a wide array of available alternatives for travelers over other gateways with comparable elapsed travel times. Accordingly, we find that the proposed alliance will increase competition and service options in the behind- and beyond-gateway U.S.-Scandinavia markets.

Our analysis also indicates that the proposed United and SAS alliance will bring on-line service to as many as 32,000 city-pair transatlantic markets with an estimated traffic of nearly 29 million passengers, including nearly 13 million passengers in beyond-gateway markets. When coupled with Lufthansa, we estimate that the tripartite alliance will bring on-line service to

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41 Source: T-100 and T-100f nonstop segment and market data (Data Banks 28-IS and 28-IM), 12 months ended March 1996.

42 SAS offers nonstop service in only five U.S.-Scandinavia city-pair markets: Newark-Copenhagen/Stockholm/Oslo and Chicago/Seattle-Copenhagen. Joint Application, at 39.

43 We note that the United and Lufthansa agreement with the Department of Justice resolves any concerns regarding competition in these two nonstop markets. As proposed by United, Lufthansa, and the Department of Justice, our grant of immunity excludes certain facets of the carriers' operations in those two markets. That exclusion is being maintained by this order. *See* Orders 96-5-27 and 96-5-12.

44 Our analysis is based on Origin-Destination Survey of Airline Passenger Traffic for the twelve months ended September 1995, adjusted to account for traffic carried by non-reporting foreign airlines.

over 66,000 transatlantic markets serving 57 million passengers, including over 20 million passengers in beyond-gateway markets.[45]

B. Public Interest Issues

Under Section 41309 we must determine whether the Alliance Agreements would be adverse to the public interest. A similar public interest examination is required by Section 41308. Except as noted, we find that approval of the Alliance Agreements will promote the public interest.

Open-Skies agreements with foreign countries give any authorized carrier from either country the ability to serve any route between the two countries (and open intermediate and beyond rights) if it so wishes. These agreements place no limits on the number of flights that can be operated, and carriers can charge any fare unless it is disapproved by both countries.[46]

We recognize that the agreements reached by the United States and Denmark, Norway, Sweden, and the Federal Republic of Germany, which establish Open-Skies regimes between the United States and these Governments, do not require us to grant a request for antitrust immunity for agreements integrating the services of United, SAS, and Lufthansa. However, we have found that the Alliance Agreements are likely to benefit the traveling public in numerous markets and will not eliminate or substantially reduce competition in any markets.

As enunciated in our April 1995 U.S. International Air Transportation Policy Statement, we recognize that airlines worldwide are forming alliances and linking their systems to become partners in transnational networks. This process enables these airlines to achieve the operating efficiencies of larger networks. Thus, these international partnerships are better able to offer improved service to a wider array of city-pair markets. We are already seeing the benefits of these international alliances, and have undertaken to facilitate them and the efficiencies they can generate, where consistent with consumer welfare. We believe that competition between

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45 Our analysis is based on Origin-Destination Survey of Airline Passenger Traffic for the twelve months ended September 1995, adjusted to account for traffic carried by non-reporting foreign airlines. Our decision here is based in part on statistics extracted from restricted international O&D Survey data and international T-100 and T-100(f) data reported to the Department. We have determined that the public interest warrants our use of and limited disclosure of such data in this proceeding, because the public interest in evaluating this application on the basis of this data clearly outweighs any possible competitive disadvantage U.S. carriers might face from release of the data to foreign carriers. This determination is consistent with (1) the requirements set forth in sections 19-6(b) and 19-7(e) of 14 CFR Part 241 as they pertain to international T-100/T-100(f) data and O&D data, respectively, and (2) the Department's policy statement set forth in 14 CFR section 399.100, which provides that the Department may disclose restricted O&D data consistent with its regulatory functions and responsibilities.

46 Order 92-8-13, August 5, 1992.

and among these global alliances is likely to play a critically important role in ensuring that consumers, in this emerging environment, have multiple competing options to travel where they wish as economically and conveniently as possible.

In this case, we have determined that the overall competitive effect of the Alliance Agreements is beneficial and consistent with our international aviation policy, we believe that the public interest favors the grant of antitrust immunity. In so stating, of course, we will continue to monitor closely the effects of an immunized alliance on consumers and on competition, to ensure that the immunized alliance continues to serve the public interest.

VII. GRANT OF ANTITRUST IMMUNITY

We have the discretion to grant antitrust immunity to agreements approved by us under Section 41309 if we find that immunity is required by the public interest. It is not our policy to confer antitrust immunity simply on the grounds that an agreement does not violate the antitrust laws. However, we are willing to grant immunity if the parties to such an agreement would not otherwise go forward without it, and we find that grant of antitrust immunity is required by the public interest.

The record shows that United, SAS, and Lufthansa are unlikely to proceed with the Alliance Agreements without antitrust immunity. The Alliance Agreements submitted by the Joint Applicants specifically provide that the parties will not proceed with the implementation of the proposed arrangements absent immunity from U.S. antitrust laws. The Joint Applicants maintain that the public benefits that the airlines seek to achieve through the formation of an expanded alliance cannot be accomplished absent antitrust immunity. They claim that the proposed integration of services will assuredly expose them to antitrust risk, since they fully intend to establish a common financial objective, permitting them to compete more effectively with other strategic alliances. Additionally, they point out that full operational integration will necessarily mean that they will coordinate all of their U.S.-Europe business activities, including scheduling, route planning, pricing, marketing, sales, and inventory control.

Since the antitrust laws allow competitors to engage in joint ventures that are pro-competitive, we think it unlikely that the integration of the applicants' services would be found to violate the antitrust laws.[47] However, since the Joint Applicants are proposing to end their price competition in certain markets, they could be exposed to liability under the antitrust laws if we did not grant immunity, as we have found in other recent immunity cases.[48]

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47 These arrangements between airlines are today commonplace. We are unaware of any holding that such arrangements violate the antitrust laws. Order 92-11-27 at 19.

48 For example, *see* Order 96-5-12, at 19-20, and Order 96-5-26, at 20-22.

To the extent discussed above, we find that antitrust immunity should be granted to the Alliance Agreements. We also intend to review and monitor the applicants' progress in implementing the Agreements in order to ensure that they are carrying out the Agreements' pro-competitive aims. We will also require the Joint Applicants to resubmit the Agreements for review before May 20, 2001.

While we conclude that the alliance should be approved and given immunity, we find, as discussed next, that certain conditions appear necessary to allow us to find that approval and immunity are in the public interest.

VIII. IATA TARIFF COORDINATION ISSUE[49]

As we have determined in other immunity cases, it is contrary to the public interest to permit alliances to participate in certain price-related coordination that is now immunized within IATA tariff coordination. This "dual" immunity would raise unacceptable risks to competition and consumers. We therefore condition our approval and grant of antitrust immunity in this case by requiring the applicants to withdraw from participation in any IATA tariff conference activities that discuss any proposed through fares, rates or charges applicable between the United States and Scandinavia,[50] or between the United States and any other countries designating a carrier that has been granted antitrust immunity or renewal thereof by the Department for participation in similar alliances with a U.S. airline.[51]

Consistent with our earlier decisions, we therefore have decided to condition our grant of antitrust immunity to the Alliance upon the withdrawal by the applicants from IATA tariff coordination activities affecting through prices between the U.S. and Scandinavia and between the U.S. and any other country that has designated a carrier whose alliance with a U.S. carrier has been or is subsequently given immunity by us. Under this condition, the Alliance carriers may not participate in IATA tariff coordination activities affecting fares, rates, and charges between the United States and Denmark, Norway, and Sweden and between the United States and the homeland(s) of their similarly-immunized alliance competitors. Through prices

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49 SAS states that it is prepared voluntarily to withdraw from participation in any IATA traffic coordination activities that discuss any proposed through fares, rates or charges applicable between the United States and Denmark, Norway, and Sweden, and between the United States and any other countries designating a carrier granted antitrust immunity for participation in similar alliance activities with a U.S. carrier. Joint Application, at 41-42.

50 For the purposes of this order, Scandinavia is understood to include Denmark, Norway, and Sweden.

51 This condition currently applies to prices between the United States and the Netherlands, between the United States and Germany (Order 96-5-27, at 17), and between the United States and Austria/Belgium/Switzerland (Order 96-6-33, at 23-24). *See* also May 8, 1996, letter in Dockets OST-96-1116 and OST-95-618 from Northwest and KLM indicating their willingness to limit voluntarily their participation in IATA.

between the U.S. and other countries, as well as all local fares in intermediate and beyond markets, would not be covered by the condition.[52]

We find that this condition is in the public interest for a number of reasons. The immunity requested in this proceeding includes broad coverage of price coordination activities between the applicants. With respect to internal Alliance needs, tariff coordination through the IATA conference mechanism is duplicative and unnecessary. At the same time, one of the reasons that we find supports immunity for the proposed Alliance activities is the potential for increased price competition between the Alliance carriers and other carriers, particularly other international alliances. We believe that such potential competition will, on balance, outweigh any potential anticompetitive effects of price coordination within the Alliance itself and encourage the passing on of economic efficiencies realized by the Alliance to consumers in the form of lower prices. Permitting the alliance carriers to continue tariff coordination within IATA undermines such competition.

The International Air Transport Association (IATA) has filed a response, incorporating by reference its submissions in various other similar cases, objecting to the condition of our approval and grant of antitrust immunity to the Alliance Agreements upon the withdrawal by the Joint Applicants from IATA tariff coordination activities affecting through prices between the U.S. and Scandinavia, and between the U.S. and any other country that has designated a carrier(s) whose alliance with a U.S. carrier has been or is subsequently given immunity by us.

As we have stated in earlier cases, we are not persuaded by IATA's arguments that we should consider any limitation on participation by carriers in IATA tariff coordination only in the context of its application for continued approval of and antitrust immunity for its Tariff Conference procedures in Docket 46928. Our condition is limited to prices between the United States and countries which have accepted the concept of competitive pricing and for whom the grant of alliance immunity is a reasonable substitute for IATA tariff conference participation, so long as competing immunized alliances are placed on an equal footing. Moreover, we find no basis for IATA's assertion that our condition would deprive other carriers of their ability to participate in the interline system. Participation in interline agreements, including the Standard Interline Traffic Agreement, is not a Tariff Conference function; participation in the agreements is not dependent on IATA membership or participation; and they would not be affected by our condition.

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52 Under this condition, the Alliance carriers could not participate in IATA discussions of the total ("through") price (*see* 14 CFR § 221.4) between a U.S. point of origin or destination and an origin or destination in Denmark, Norway, and Sweden, or a homeland of a previously or subsequently immunized alliance, whether such prices are offered for direct, on-line or interline service. They could, however, discuss local segment prices, arbitraries, or generic fare construction rules that have independent applicability outside such markets. IATA activities covered by our condition would include all those discussing prices proposed for agreement, including both meetings and exchanges of documents such as those preceding meetings and those used in mail votes.

IX. O&D SURVEY DATA REPORTING REQUIREMENT[53]

We have access to market data where our carriers operate, including markets that they serve jointly with foreign airlines, for example, the Department's Origin-Destination Survey of Airline Passenger Traffic (O&D Survey). We have also collected special O&D Survey code-share reports for certain other large alliances, and have directed all other U.S. airlines to file reports for their transatlantic code-share operations beginning with the second quarter of 1996.

However, we receive no market information for passengers traveling to or from the U.S. when their entire trip is on foreign airlines, except for T-100(f) data for on-flight markets. Such passengers account for a substantial portion of all traffic between the U.S. and foreign cities, and the absence of such information severely handicaps our ability to evaluate the economic and competitive consequences of the decisions we must make.

In addition to the added importance of our decision-making regarding international issues, we must also ensure that our grant of antitrust immunity does not lead to anticompetitive consequences. We have therefore decided to require SAS to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by United).[54]

X. COMPUTER RESERVATION SYSTEMS (CRS) PARTICIPATION

We have decided to grant the United and SAS request for antitrust immunity to coordinate their CRS and internal reservations system. Although United and SAS state that they do not intend to coordinate the management of their respective interests in CRS systems in which each may have an ownership interest, the record indicates that SAS has no ownership interest in any CRS system.[55] Accordingly, we find that there is no need to impose conditions or otherwise limit immunity with respect to United/SAS CRS operations.[56]

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53 We intend to provide confidentiality protection for this data, as we do for international data submitted by U.S. airlines. As we intend to use this data for internal monitoring purposes, we do not intend to disclose the foreign carrier data to any other airlines, to avoid competitive concerns.

54 Consistent with our determinations in Orders 96-5-27, 96-6-33, and 96-7-21 we intend to request other foreign carrier members of immunized international alliances involving U.S. carriers to submit O&D Survey Data and we intend to condition any further grants or renewals of antitrust immunity on provision of such data. We will treat the foreign carriers' O&D data as confidential, will not allow U.S. carriers any access to the data, and will not allow SAS or other foreign carriers any access to U.S. carrier O&D Survey data.

55 Joint Application, at 12.

56 The antitrust immunity earlier provided United and Lufthansa did not cover any activities of the carriers as owners of Apollo/Galileo and Amadeus/START computer reservation systems businesses. *See* Order 96-5-27, ordering paragraph 1.

XI SUMMARY

We conclude that granting the applications for approval and antitrust immunity for the Alliance Agreements will benefit the public interest by enhancing service options available to travelers. We believe that the Alliance Agreements will strengthen competition in the markets that the applicants serve, since it will enable them to offer better service and to operate more efficiently. Furthermore, we expect that the Alliance Agreements and the proposed integration of their airlines operations will strengthen United's ability to compete effectively against existing alliances and the other major European airlines.

We direct the Joint Applicants to resubmit the pertinent Alliance Agreements before May 20, 2001. However, the Department is not authorizing the Joint Applicants to operate under a common name. If the Joint Applicants wish to operate under a common name, they will have to comply with our relevant procedures before implementing the change.

We also direct the Joint Applicants to withdraw from participation in any International Air Transport Association (IATA) tariff conference activities that discuss any proposed through fares, rates, or charges applicable between the United States and Denmark, Norway, and Sweden; and/or the United States and any other countries whose designated carriers participate in similar agreements with U.S. airlines that were previously or are subsequently granted antitrust immunity or renewal thereof by the Department. We direct the Joint Applicants to file all subsidiary and/or subsequent agreement(s) with the Department for prior approval.[57] We also direct SAS to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that contain a United States point (similar to the O&D Survey data already reported by United).

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57 Regarding this requirement, we do not expect the alliance partners to provide the Department with minor technical understandings that are necessary to blend fully their day-to-day operations but that have no additional substantive significance. We do, however, expect and direct the Joint Applicants to provide the Department with any contractual instruments that may materially alter, modify, or amend the Alliance Agreements. The Joint Applicants must submit subsequent subsidiary agreements implementing the Alliance Agreements for prior approval.

ACCORDINGLY:

1. We approve and grant antitrust immunity, as discussed by this order, to the Alliance Agreements between/among United Air Lines, Inc., Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their subsidiaries, insofar as it relates to foreign air transportation, subject to the terms, limitations, and conditions set forth in Order 96-5-27, and also subject to the limits and conditions indicated in ordering paragraph 3, below;

2. We direct United Air Lines, Inc., Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their subsidiaries, to resubmit their variously styled Alliance Agreements before May 20, 2001;

3. We condition our grant of approval and antitrust immunity to require United Air Lines, Inc., Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their subsidiaries, to withdraw from participation in any International Air Transport Association (IATA) tariff coordination activities that discuss any proposed through fares, rates or charges applicable between the United States and Denmark, Norway, and Sweden, the United States and Austria, Belgium, Germany, the Netherlands, and Switzerland; and/or the United States and any other countries designating a carrier granted antitrust immunity, or renewal thereof, for participation in similar alliance activities with a U.S. carrier;

4. We direct Scandinavian Airlines System to report full-itinerary Origin-Destination Survey of Airline Passenger Traffic for all passenger itineraries that include a United States point (similar to the O&D Survey data already reported by its alliance partner United Air Lines, Inc.);[58]

5. We direct United Air Lines, Inc., Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their subsidiaries, to obtain prior approval from the Department if they choose to operate or hold out service under a common name or use "common brands";

6. We delegate to the Director, Office of International Aviation, the authority to determine the applicability of the directive set forth in ordering paragraph 3, above, and further described in footnote 52, to specific prices, markets, and tariff coordination activities, consistent with the scope and purpose of the condition as heretofore described;

7. We direct United Air Lines, Inc., Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their subsidiaries, to submit any subsequent subsidiary agreement(s) implementing the Alliance Agreements for prior approval;[59]

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58 This directive is fully consistent with our previous decisions in Orders 96-5-27, 96-6-33, and 96-7-21.

59 *See* fn. 57, p. 22, *supra*.

8. We defer action on the motions filed by United Air Lines, Inc. and Scandinavian Airlines System for confidential treatment of certain data and information;

9. This order is effective immediately; and

10. We shall serve this order on all parties served with these applications.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

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